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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 604.

GRAVER TANK & MFG. CO., INC., and
THE LINCOLN ELECTRIC COMPANY,

Petitioners,

v.

UNION CARBIDE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit.

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December 20, 1960.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8847

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RECORD REFERENCES.

The record in this case has been certified to this Court in the companion case, No. 576, October Term 1960, styled *Union Carbide Corporation v. Graver Tank & Mfg. Co., Inc.* and *The Lincoln Electric Company.*

Citations to Volumes I-IV of the record (i.e., the joint appendix filed in the court below and certified here) are to page numbers in parentheses, e.g. "(1145)." Pages 1-480 are in Volume I, pages 481-954 are in Volume II, pages 955-1343 are in Volume III, and pages 1345-1402 are in Volume IV which is the supplemental joint appendix.

The "Exhibit Volume" of the joint appendix is separately paged. Citations to that volume are by exhibit number followed by the exhibit-volume page number, e.g. "(DX 241, Exhibit Volume, p. 492)."

Citations to the two-volume printed record of the original infringement case in this Court (Nos. 184 and 185, October Term 1948, 336 U. S. 271, and No. 2, October Term 1949, 339 U. S. 605) are to "O. R." for "old record," e.g. "(I O. R. 46)."

Citations to the two-volume printed record in the contempt case (No. 714, October Term 1951 in this Court, upon denial of certiorari, 343 U. S. 967) are to "C. R." for "contempt record," e.g. "(II C. R. 760)."

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals For the Seventh Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review judgments entered in the following companion appeals in that court:

No. 12,797, wherein respondent, Union Carbide Corporation, is plaintiff-appellant, and petitioners, Graver Tank & Mfg. Co., Inc. and The Lincoln Electric Company, are defendants-appellees, and

No. 12,798, wherein petitioners, Graver Tank & Mfg. Co., Inc. and The Lincoln Electric Company, are defendants-appellants, and respondent, Union Carbide Corporation, is plaintiff-appellee.

The two appeals were separately taken by petitioners and respondent from the judgment entered in the United States District Court for the Northern District of Indiana,

Hammond Division, by District Judge Luther M. Swygert, upon remand from this Court. The appeals were jointly heard in the Court of Appeals by Chief Judge John S. Hastings and Circuit Judges F. Ryan Duffy and J. Earl Major, upon a single record, and were decided by it in a single opinion by separate but identical judgments entered in each case.

NATURE OF THE CASE.

This petition brings unfinished business to this Court.

As now appears, the prior decision of this Court, in this case, was induced by fraud.

The action is on a patent, U. S. No. 2,043,960, owned by respondent Union Carbide Corporation, which, as it originally issued, dominated the field of submerged arc welding. It covered the process and substantially all fluxes usable in the process.

This Court, in this case, held the patent valid as to four claims covering a flux for use in the process but held the dominating flux claims and the process claims invalid. This Court further, two justices dissenting, held that the accused product, Lincolnweld 660 flux, although not within the valid claims as written, infringed the patent by application of the doctrine of equivalents:

> *Graver Tank & Mfg. Co., Inc. and The Lincoln Electric Company v. The Linde Air Products Company* (1949), 336 U. S. 271;
>
> *Graver Tank & Mfg. Co., Inc. and The Lincoln Electric Company v. The Linde Air Products Company* (1950), 339 U. S. 605.

The question of damages then left open is now before this Court.

It arises upon a record that shows this Court's holding of infringement was induced by representations now exposed as false by sworn proofs filed by the successful party, in other proceedings in the Patent Office.

—Opinions Below.

The opinion of the Court of Appeals is reported in 282 F. 2d 653, 127 U. S. P. Q. 3; the opinion of the District Court appears in 124 U. S. P. Q. 62.

Both opinions are set forth in the appendix to the petition for certiorari in the companion case, *Union Carbide Corporation v. Graver Tank & Mfg. Co., Inc.* and *The Lincoln Electric Company*, No. 576, October Term 1960, the opinion of the Court of Appeals at page A-58 and the opinion of the District Court at page A-38.

—Jurisdiction.

The judgments below, entered upon separate appeals by petitioners and respondent, are dated and were entered by the Court of Appeals on August 31, 1960. Petition for rehearing, seasonably filed, was overruled on October 13, 1960.

The judgment is set forth in the appendix to the petition for certiorari in No. 576, at page A-105.

This Court has jurisdiction to review under 28 U. S. C. § 1254(1) upon petition filed pursuant to 28 U. S. C. § 2101(c).

QUESTIONS PRESENTED.

This case presents two questions:

1. **Whether fraud bars** patent infringement damages where a party obtains from this Court a determination of infringement by representations which, as is subsequently discovered, are false, as shown by the party's sworn proofs filed in other proceedings in the Patent Office.

THE COURT OF APPEALS RECOGNIZED that its hands were tied by this Court's mandate. However, as to the representations that induced the determination of infringement, the Court of Appeals noted:

> "It is suggested that these representations made to the Patent Office are immaterial as they bear only upon the issue of infringement which has been adjudicated adversely to Lincoln." (Appendix to petition in No. 576, p. A-71; 282 F. 2d at 661.)

THE COURT OF APPEALS SAID, as to this excuse:

> "True, that issue is no longer open but, even so, it is an interesting, though futile, matter for speculation as to what the courts would have decided on the issue of infringement if they had been favored with the appraisement which Clapp and Miller later placed upon the teachings of the Jones patent [i.e., Union Carbide's sworn proofs filed in other proceedings in the Patent Office]." (Appendix in No. 576, p. A-71; 282 F. 2d at 662.)

2. **Whether the standard for measuring damages for patent infringement, on the basis of the statutory "reasonable royalty" for the sale of $4,353,777 worth of infringing product, an electric arc welding flux, permits damages to be calculated by taking into account, not only the infringing product, but also:**

   (a) **$9,138,194 worth of electric arc welding machinery and equipment not covered by the patent but *usable with the patented flux*, and, in addition,**

   (b) **$99,124,605 worth of electric arc welding machinery, equipment and supplies not covered by the patent and *not even usable with the patented article*.**

THE COURT OF APPEALS NOTED that in determining the statutory "reasonable royalty" in this case:

> "many factors were taken into consideration, including Lincoln's profits not only from the sale of the infringing flux but also from the sale of non-infringing items." (Appendix in No. 576, p. A-97; 282 F. 2d at 674-675.)

THE COURT OF APPEALS SAID, in approving the calculation based in part on noninfringing products, including materials not even usable with the patented article, that it deemed the question not settled by authority, and added:

> "the question, in our view, is not entirely free from doubt." (Appendix in No. 576, p. A-90; 282 F. 2d at 671.)

STATUTE INVOLVED.

The statute governing patent infringement damages, 35 U. S. C. § 284, with the particularly relevant part italicized, reads:

> "Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a *reasonable royalty for* the use made of *the invention* by the infringer, together with interest and costs as fixed by the court."

STATEMENT OF CASE.

This action for infringement of Jones patent No. 2,043,960, relating to electric welding, was brought before the United States District Court for the Northern District of Indiana, Hammond Division, pursuant to 28 U. S. C. § 1338(a).

Infringement having been determined in the prior proceedings, the case now comes here on the question of damages allowable.

—The Parties.

The action was originally brought by The Linde Air Products Company, a wholly owned subsidiary of Union Carbide and Carbon Corporation. The subsidiary has since been merged into its parent which, by change of name, is now known as Union Carbide Corporation. It has been substituted as plaintiff in place of the original plaintiff.

The action was brought against Graver Tank & Mfg. Co., Inc., a concern in East Chicago, Indiana, engaged in the manufacture of tanks and like products, a user of the assertedly patented process and of the flux adjudged to

infringe, and against The Lincoln Electric Company of Cleveland, Ohio, a manufacturer of electric arc welding machinery, equipment and fluxes, including the flux held to infringe.

—The Patent in Suit.

The patent, until decision here, covered the process of submerged arc welding and fluxes usable therewith. The process claims and the dominating flux claims were here held invalid, and the patent monopoly confined to:

> "that which was claimed and bounded by the composition claims Nos. 18, 20, 22 and 23." (336 U. S. at 274.)

Each of these claims is confined to a welding flux:

> "containing a major proportion of alkaline earth metal silicate * * *." (See patent, Exhibit Volume, p. 6.)

The flux Lincoln made and sold, known as Lincolnweld 660, which was held an infringement, was 95% manganese silicate. (Appendix in No. 576, p. A-71; 282 F. 2d at 661.) Although manganese silicate is *not* an alkaline earth metal silicate (339 U. S. at 610), this Court, Mr. Justice Black and Mr. Justice Douglas dissenting, held it an equivalent and, therefore, an infringement.

—The Fraud on the Courts.

Union Carbide represented to the courts, including this Court—and thereby obtained the determination of infringement—that, to the expert eye, Jones taught the use of manganese silicate as a welding flux and that manganese silicate was, therefore, "an equivalent" of the material of the claims. It now turns out that Union Carbide's sworn proofs, then on file in other proceedings in the Patent Office, brand those representations false.

(i) Union Carbide Represented to the Courts That Use of Manganese Silicate as Welding Flux Was Taught by Jones Patent in Suit, as Read by Experts.

Union Carbide induced the trial court to find on the original trial, and this Court to affirm, that:

> "The patent discloses that manganese silicate, when used as a principal constituent of a welding composition prepared according to the teachings of the patent, is a proper substitute for the silicates of the alkaline earth metals." (Judge Swygert's Finding 14 on the original trial; I O. R. 925.)
>
> "A person skilled in the art can produce the accused Lincolnweld 660 flux by following the teaching of the patent in suit." (Judge Swygert's Finding 22 on the original trial; I O. R. 926.)
>
> "The patent in suit teaches the substitution of manganese for other basic oxides and is not limited to the use of a moderate amount of manganese in addition to other basic oxides." (Judge Swygert's Finding 24 on the original trial; I O. R. 927.)

By hiding what was known to its own experts, Union Carbide induced Judge Swygert to make these findings on June 6, 1947. In reliance on those representations, repeated here, this Court deemed Lincoln's use of manganese silicate an infringement.

(ii) Union Carbide's Sworn Proofs in Other Proceedings Show the Representations on Which This Court Acted Were False.

Union Carbide's sworn proofs, filed in other proceedings in the Patent Office were not known at the time. They were not discovered until after the Master's report assessing damages in this case had been submitted to the District Court.

The record of Union Carbide's duplicity (summarized by the Court of Appeals in its opinion, pages A-69 to

A-71 of the appendix in No. 576, and 282 F. 2d at 661-662) unfolds in DX 241 and DX 242, Exhibit Volume, pp. 488-500. These are the file wrappers detailing the proofs Union Carbide submitted to the Patent Office to induce the issue of two other patents. The proceedings to obtain those patents were prosecuted by the same patent solicitors who theretofore had obtained the Jones patent in suit. On both applications patents issued; both are owned by Union Carbide.

One of the subsequent patents issued to Clapp, a welding engineer in the employ of Union Carbide. He is no small-bore engineer. He is in charge of Union Carbide's research laboratories. In support of that patent application, another employee of Union Carbide, Keir, a welding engineer, also vouched for by Union Carbide, submitted his affidavit setting forth further information concerning the Jones patent.

The second of the two later patents issued to Miller, another employee of Union Carbide. In support of that patent Clapp filed his affidavit concerning his investigations of Jones.

Now, note this—

Union Carbide represented to the courts, including this Court, that, to the expert eye, the Jones patent taught the use of manganese silicate up to the 95% used by Lincoln in its 660 flux. But Union Carbide chose not to reveal to the courts its sworn proof to the Patent Office that Jones did *not* teach the use of manganese, except only as an additive "in moderate amounts," meaning less than 4%. (Exhibit Volume, pp. 489, 490, 494.)

The information Union Carbide submitted to the Patent Office (but did not disclose to the courts) was neither casually collected nor hastily analyzed. It was no

offhand piece of work: To the contrary, Clapp in his affidavit told the Patent Office that for "seven years" he had "spent the major portion of his time" (Exhibit Volume, p. 498) studying welding "of the type described" in the Jones patent and he, Miller, and Keir, and the patent solicitors agreed that in the Jones patent:

> "there is clearly no teaching for what purpose or in what amounts it [i.e., manganese] is to be added." (Exhibit Volume, p. 490.)

Clapp assured the Patent Office that he found out only "after a great deal of experimentation" that it would be possible to use *as much as 4% to 16%* (Exhibit Volume, p. 490) and this he and his colleagues said was "new and unobvious" (Exhibit Volume, pp. 490, 491, 493, 499), most surely "not apparent from the teaching of U. S. patent No. 2,043,960"—i.e., the Jones patent in suit (Exhibit Volume, p. 493), and "could not have been predicted from the teachings" of Jones. (Exhibit Volume, pp. 496, 499.)

Clapp, who on May 14, 1940 (with the help of his fellow employee Keir, billed as "an entirely disinterested expert," Exhibit Volume, p. 491) obtained his patent on welding with a flux containing up to 16% manganese (Exhibit Volume, p. 488), explained, when Miller sought, and (on January 12, 1943) obtained, his patent on welding with a flux containing "from 30% to 65% of manganese oxide" (Exhibit Volume, p. 494), that on the basis of his seven-year study of Jones (Exhibit Volume, p. 498) he had been "of the opinion" that:

> "welding conditions were adversely affected *if the manganese percentage was above 16%*" (Exhibit Volume, p. 499)

and that it was not only novel and unobvious, but absolutely "surprising to him" (Exhibit Volume, p. 499), that the Miller flux, which included as much as "*30% to 65% of manganese oxide*" (Exhibit Volume, p. 494):

> "produces entirely satisfactory results *even though the manganese content is far higher than he had thought permissible.*" (Exhibit Volume, p. 499.)

This, he swore, "could not have been predicted" from Jones. (Exhibit Volume, p. 499.)

But Union Carbide nevertheless felt free to assure the trial court, and this Court, that 95% manganese was the teaching of Jones, as read by experts.

Both of these Union Carbide experts testified on the original trial before Judge Swygert (Clapp at I O. R. 161, and Keir at I O. R. 676), and again on the present accounting proceedings (Clapp at 1102 and Keir at 475). But, instead of revealing then, what has now been unearthed, Union Carbide chose to keep that information hidden.

The other point the case raises relates to—

—Toll Laid on Noninfringing Products.

The Master found, and the District Court and the Court of Appeals agreed, Union Carbide proved no damages. Accordingly, recovery was allowed on the basis of the statutory:

> "reasonable royalty for the use made of the invention by the infringer * * *." (35 U. S. C. § 284.)

The infringing product sold for a total of $4,353,777. Instead of calculating the statutory "reasonable royalty" as a reasonable percentage of the selling price of the infringing article, the Master took into account—and the District Court and the Court of Appeals approved—sales

of other products, not covered by the patent, which in no way infringed, which consisted of ordinary articles of commerce sold by other manufacturers, and most of which were not even usable with the patented article. The non-infringing materials taken into account, on which in part Union Carbide's recovery is based, are:

(a) $9,138,194 worth of welding machinery, equipment and supplies not covered by the patent but *usable with the patented flux*. More than a third in dollar amount comprised generators sold by Lincoln in competition with other manufacturers but which were not even sold by Union Carbide. Nearly one-third was welding rod sold by Lincoln in competition with Union Carbide and at least 18 others. The balance comprised a unique Lincoln development, the squirt welder, and, in addition, equipment sold by Lincoln in competition with other manufacturers such as General Electric and Westinghouse. (Finding 47, 1169.)

(b) $99,194,605 worth of other welding supplies and equipment not covered by the patent and *not even usable with the patented product*. This was largely hand welding equipment having nothing to do with submerged-arc welding or with the patent in suit. (Finding 46, 1169; 1185.)

The Master found, and both courts below agreed, that the 660 flux did not bring new customers to Lincoln. Lincoln was a long-established manufacturer (Finding 23, 1159) and, before it made any 660 flux, already "had commercial entree to virtually all industrial plants having a use for electric arc welding." (Finding 24, 1160.) "More than 99% of all the 660 flux was sold to purchasers who

were already customers of Lincoln for other products." (Finding 45, 1169.)

In addition to the $108,332,799 of nonpatented products taken into account in calculating the statutory "reasonable royalty" on $4,353,777 worth of infringing flux, Union Carbide sought to include also other welding fluxes sold by Lincoln. These are the 700-series fluxes Lincoln marketed after this Court held the 660 flux infringed. The 700-series fluxes were charged by Union Carbide to be infringing articles, but they were adjudged, subsequent to the proceedings in this Court, to be outside the patent. 196 F. 2d 103, certiorari denied 343 U. S. 967, rehearing denied 344 U. S. 849. The District Court held the noninfringing 700-series fluxes could not be taken into account in calculating the statutory "reasonable royalty" on the infringing 660 flux because:

> "if the royalty on the infringing flux is increased by reason of the sales of the 700-series flux, the result is the same as if Lincoln were compelled to pay for selling flux which the Court of Appeals said did not infringe." (54.)

The Court of Appeals agreed Lincoln could not be required to pay a royalty in any degree based on its sales of the noninfringing 700-series fluxes, but held the equally noninfringing machinery and equipment, including products not even usable with the patented article, *could be* taken into account in calculating the statutory "reasonable royalty" on the infringing flux.

The Court of Appeals noted that in calculating the amount recoverable as a "reasonable royalty" on the sale of $4,353,777 of infringing flux:

> "The Master found that during the period of infringement Lincoln sold non-infringing machines, equip-

ment and supplies, *usable with* the 660 flux, amounting to $9,138,194.99, on which Lincoln's profit before taxes was $1,393,042.39, and also sold non-infringing machines, equipment and supplies, *not usable with* the 660 flux but purchased by customers who had purchased 660 flux, amounting to $99,194,605, on which Lincoln's profit before taxes was $15,228,416, and after taxes $8,468,708.

The Master in his report stated that he did 'take into consideration the fact that Lincoln did sell welding supplies, equipment and machines usable both with and independent of its 660 flux and the extent of such sales and the profit it made from such operations in arriving at a reasonable royalty for the 660 flux * * *.'" (Appendix in No. 576, pp. A-89 to A-90; 282 F. 2d at 671.)

The Court of Appeals approved inclusion of such non-infringing products in the calculation of the statutory "reasonable royalty" but said:

"the question, in our view, is not entirely free from doubt." (Appendix in No. 576, p. A-90; 282 F. 2d at 671.)

REASONS FOR ALLOWANCE OF WRIT.

The writ prayed for should issue because:

I. FRAUD WAS COMMITTED ON THIS COURT IN OBTAINING DETERMINATION OF INFRINGEMENT.

A litigant who makes representations to the courts, indifferent to sworn proofs it offers on the same subject in other proceedings, should not profit by its fraud.

If this matter had proceeded to final judgment, fraud subsequently appearing would destroy the judgment. The successful party would be required to yield up the fruit so obtained:

> *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* (1944), 322 U. S. 238;
> *Shawkee Manufacturing Co. v. Hartford-Empire Co.* (1944), 322 U. S. 271.

The same rule of law surely should apply where, as here, the holding of infringement is interlocutory and the case still open for determination of damages.

The Court of Appeals could not right this wrong. It was bound by this Court's mandate. A lower court "has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania Railroad Co.* (1948), 334 U. S. 304, 306. However, this Court is not so bound. It made the order. It alone can undo it. It should do so to protect the integrity of its proceedings. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* (1944), 322 U. S. 238.

II. THIS COURT SHOULD SAY WHETHER PATENT INFRINGEMENT DAMAGES MAY BE MEASURED BY PRODUCTS NOT COVERED BY PATENT AND NOT EVEN USABLE WITH PATENTED ARTICLE.

If the judgment below stands, the rule controlling patent infringement damages will have been vastly expanded.

The statute, 35 U. S. C. § 284, allows damages measured by "the use made of the invention by the infringer." Here damages have been enhanced by adding to "the invention" products which are ordinary articles of commerce, are not covered by the patent, do not infringe, are sold by many competitors, and which in large part are not even usable with the patented article.

Had the patent owner licensed Lincoln to use its patent upon payment of a royalty measured by the sale, not only of the patented article, but of nonpatented products as well, this Court's cases would brand that a prohibited misuse of the patent. All recovery would be barred. As this Court, in *Mercoid Corporation v. Mid-Continent Investment Co.* (1944), 320 U. S. 661, pointed out (p. 666):

> "The fact that the patentee has the power to refuse a license does not enable him to enlarge the monopoly of the patent * * *."

This rule, the Court in *Leitch Manufacturing Co. v. Barber Company* (1938), 302 U. S. 458, said (p. 463):

> "applies whatever the nature of the device by which the owner of the patent seeks to effect such unauthorized extension of the monopoly."

Here a license the parties could not lawfully have agreed upon is made the measure of damages. Here the parties are, by the measure of damages the courts below applied, deemed to have made an agreement the law would not have permitted them to make. The "reasonable royalty," under the statute, and under this Court's

decisions, must be calculated on "the invention"—in this case, the flux. The patentee may not collect on matter outside the patent. As is pointed out in *"What Is a Patent?"* 13 Law and Contemporary Problems 245, by Walton Hamilton and Irene Till (p. 248):

> "His remuneration—if much or less or any at all—must come directly from the exclusive right with which he is endowed in the practice of the invention. It does not, according to the Constitution and the statutes, come from privileges in relation to matters outside the invention."

Here the royalty has been calculated on "matters outside the invention."

The Court of Appeals approved, "even though the question, in our view, is not entirely free from doubt." (Appendix in No. 576, p. A-90; 282 F. 2d at 671.)

The law should so be settled that there will be no doubt.

CONCLUSION.

This case presents questions of obvious importance. They are questions important:

1. To the integrity of the judicial process, and
2. To every patent accounting, from here on indefinitely into the future until this Court shall otherwise speak. The standard to be applied in measuring damages should not—to the loss of the American people—be left in doubt.

Respectfully submitted,

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